IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 50 OF 2005

Sambhaji Narsayya Adval. ... Appellant.

Versus.

Mokate Trust and others. ... Respondents.

Shri A.A.Valasangkar with Shri Pankaj J.Das for the Appellant.

CORAM : ABHAY S. OKA, J.

DATED : 25th January, 2005.

P.C.:

1. This Appeal arises out of the order passed in the Execution proceedings. The Appellant is one of the Judgment Debtors. The Appellant made an application under Order XXI Rule 90 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code"), for setting aside the auction of his property in execution proceedings. The said application has been rejected by the impugned order on merits as well as on the ground that it is barred by limitation.

2. The learned Counsel appearing for the appellants did not seriously dispute that the Application was not filed within the limitation prescribed by Article 127 of the Limitation Act, 1963. He, however, submitted that there is utter carelessness on the part of the Executing Court in following the procedure prescribed by the said Code and even valuation of the property has been carelessly

made. Relying upon the judgment of the learned Single Judge of the Calcutta High Court reported in AIR 1977 Calcutta 235 (Jyotish Chandra Rakhit v/s.Smt.Parbati Bala) he submitted that if it was the case of carelessness on the part of the Executing Court, no question of limitation arises. He submitted that valuation of the property put to sale was made after the sale proclamation i.e. after 12th April 2004 and the valuation has been arbitrarily made at Rs.5 lakhs though the valuation of the property is more than Rs.20 lakhs. He submitted that for recovery of a sum of about Rs.2,43,000/- it was not necessary to put the entire land to public auction and therefore, there is a violation of Rule 64 of Order XXI of the said Code.

3. I have considered the submissions. In the Application made under Order XXI Rule 90 of the Code by the Appellant no specific contention has been raised to the effect that the entire land ought not to have been put to sale. I find from the perusal of the impugned order that such a contention is not raised when the said application was heard. It is not the case of the Appellant that the said contention was raised at the time of argument and was not considered by the learned trial Judge. Therefore, it is not permissible for the Appellant to raise the contention for the first time in the Appeal arising out of the execution proceedings. Only specific ground agitated in the Application is

undervaluation of the land.

4. As far as the second contention is concerned, the learned trial Judge has held that the Appellant has not produced on record any acceptable evidence wherein the price of the land in question has been mentioned as Rs.20 lakhs. This is not a case where the Appellant has come with a clear evidence to show that there was willing buyer on the relevant date who was ready to offer Rs.20 lakhs or even an amount more than Rs.5,35,000/- to the property in dispute. The impugned order shows that the notice under Order XXI Rule 66 of the said code was served on the Appellant on 19th June 2003. For a period of 1-1/2 years the Appellant could not procure a buyer who could have offered more than Rs.5.35.000/-. It is pertinent to note here that three bids were held and Rs.5,35,000/- is the highest bid which is offered. The purchaser has deposited 25% of the amount on 14th June 2004 and the balance amount has been deposited on 25th June 2004. In view of this position there is no merit in the contention advanced by
the learned Counsel for the Appellant.

5. As far as the Judgment of the learned Single Judge of the Calcutta High relied upon by the Appellant is concerned, I respectfully disagree with the view taken by the learned Single Judge. It is pertinent to note that Section 5 of the Limitation Act, 1963 is not

applicable to the Applications under Order XXI of the said Code. In my view even assuming that the trial Court was careless, the law of limitation will apply to the application with its full vigour. In view of express language of section 5 of the said Act of 1963, the Court is powerless to condone the delay. Though the Application was admittedly barred by limitation, the learned trial Judge has examined the merits of the matter. There is no merit in the Appeal. The Appeal is dismissed with no order as to costs.

6. At this stage the learned Counsel for the Appellant prays that the ad-interim order passed by this Court may be extended for a period of 8 weeks. The execution proceedings are pending since 2002. The Purchaser has deposited the entire price in June 2004. Hence no case is made out for extension of ad-interim order. The prayer is rejected. C.C. expedited.

Judge.